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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1546

WILLIAM BANTON MOORE, *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The petitioner, William Banton Moore, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky affirming the judgment of conviction entered by the Jefferson County Circuit Court, Criminal Branch, First Division, Louisville, Kentucky.

OPINIONS BELOW

The opinion of the trial court denying petitioner's motion for a new trial is not officially reported and is reprinted in the Appendix of this petition at 1a-11a. The opinion of the Court of Appeals of Kentucky affirming the conviction is reported at 489 S.W.2d 516 (1972) and is reprinted in the Appendix at 12a-16a. The mandate of the Court of Appeals of Kentucky noticing that court's denial of rehearing is at 17a.

JURISDICTION

The judgment of the Court of Appeals of Kentucky was entered on November 17, 1972. A timely petition for rehearing was denied on February 16, 1973. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1964).

QUESTION PRESENTED

Whether the petitioner was denied his rights to confrontation and a fair trial by a summation in which the prosecutor misstated the evidence, argued facts not in evidence, expressed his personal belief in petitioner's guilt and, fundamentally, appealed to the passions and prejudices of the jury.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to the informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

tate deprive any person of life, liberty, or property, ithout due process of law; nor deny to any person ithin its jurisdiction the equal protection of the ws.

STATEMENT OF THE CASE

On December 9, 1970, an indictment was returned harging William Banton Moore with the wilfull mur- er of his wife, Louisa Waring Moore. On June 12, 971, after a trial by jury, petitioner was convicted of voluntary manslaughter and his sentence was fixed by he jury at imprisonment for the maximum period of 1 years.

In the early morning hours of December 5, 1970, he police were called to the suburban Louisville resi- ence of William Banton Moore. The officers were net at the door by Mr. Moore and a neighbor, Dr. Burford Davis, and taken to a second floor bathroom djacent to the master bedroom. There, in a pool of lood, lay Mr. Moore's wife, Louisa. (108-113)[1]

The police interviewed petitioner and he voluntarily gave a statement which related the following informa- ion. (155-59, 308-314) Mr. Moore, at the time a fifty- ne year old architect, lived with his wife and their win daughters. Three older children lived away from ome. Mrs. Moore had taken a shopping trip to New York on November 28, 1970. She returned in the early evening of December 4, and petitioner picked her up at the Louisville airport. They had cocktails and din- ner out, returning home at 9:00 p.m. After saying

[1] All record references will be to the trial transcript. Because of its importance to this petition, the prosecutor's summation is reproduced in the Appendix at 18a-28a. Summation references will include citations to the Appendix.

goodnight to their young daughters and the maid, petitioner and his wife went to their bedroom. A conversation ensued during which petitioner's wife brought up the subject of divorce as she had done often in the past after she had been drinking. Divorce had also been discussed earlier in the week during a phone conversation from New York. Petitioner decided to avoid any argument and sleep in another room, a patterned response to such discussions developed over years of marriage.

He went downstairs and returned briefly to the bedroom to deposit the suitcases. At this time, approximately 10:30 p.m., he did not notice his wife in the bedroom and assumed she was in the bathroom. Petitioner watched television downstairs until sometime after 12:00 a.m. and then decided to see if his wife was asleep. Again not finding her in the bedroom, he entered the bathroom where he saw her lying on the floor surrounded by blood. He attempted artificial respiration, mouth-to-mouth resuscitation and heart massage without success. He called Dr. Davis, a neighbor, who examined Mrs. Moore and told petitioner that she was dead. They then called the police.

In his written statement to the police, petitioner expressly stated that he did not strike his wife and was in no way responsible for her death. At trial, the police officers testified to interrogation beyond what was in his written statement and indicated that when he was questioned about who could have killed his wife, petitioner stated that if anyone had harmed her it would have had to be he because no one else entered the house. But petitioner emphasized that he had not harmed his wife and opined that she must have suffered a fall.

The evidence presented by the Commonwealth at trial can be succinctly summarized. It consisted of petitioner's statements with particular emphasis on his exclusion of any other possible criminal actor, and expert medical testimony that the death was caused by a criminal agency rather than an accidental fall. Dr. Lawrence Boram, a fourth-year resident in pathology who conducted the autopsy, opined that death was caused by exsanguination complicated by a cerebral contusion and a skull fracture. In Dr. Boram's opinion, the head injuries resulted from multiple blows by a blunt object. (246-280) Dr. Boram's opinion in this regard was supported by Dr. Allen Lansing, a cardiovascular specialist. (230-245) The doctors concluded that the large avulsing scalp wound could not have been caused by a single fall and pointed to numerous bruises on other parts of her body as evidence of multiple blows. Moreover, the degree to which the blood was spread throughout the bathroom meant to them that the body must have moved after the wound, further suggesting a violent force rather than an accidental fall. Both doctors conceded in cross-examination, however, that a fall could have caused the death-producing injuries.

The prosecution fortified its case by pictorial and witness accounts of the gruesome bathroom scene as well as the blood-stained clothes and other physical evidence removed from the bathroom. Mrs. Moore's head injuries caused profusive bleeding with the result that the pictures and descriptions of her lying on the bathroom floor are extremely shocking and repulsive. Sixteen 5" x 7" color photos of Mrs. Moore's body and the blood-stained bathroom were introduced, as well as five pictures as she lay naked on the autopsy table.

(Com. Ex. 1, 2, 4-17, 28, 35-39) In addition, three 16" x 16" enlargements of the most shocking pictures were admitted and displayed to the jury. (Com. Ex. 32-34) No words can convey the emotional response aroused by observations of these pictures. Blood emanated from the body in all directions with the major concentration around the head. The source of the blood was an avulsing head wound which practically scalped the back half of her skull. The three enlargements focused on her head area.

For the defense, petitioner testified substantially in accord with the earlier statement he had given the police. (393-444, 452-469) Eleven character witnesses testified to petitioner's excellent reputation in the community and his peaceful, non-violent nature. (510-552) Two of the character witnesses, Louisa MacLean petitioner's step-daughter, and Dr. Burford Davis, gave additional testimony. Mrs. MacLean, who was close to her mother, testified that her mother on occasion drank excessively. Mrs. MacLean corroborated petitioner's testimony that when Mrs. Moore had a couple of drinks she would lose coordination and had fallen several times in the past. (522-530) Dr. Davis testified to his observations when called to the Moore residence on December 5th. A thoracic surgeon, Dr. Davis was unable to give a conclusive opinion whether death was caused by a fall or from blows by an instrument, but suggested that a forensic pathologist would be more qualified to testify in this regard. (510-521)

The defense called two eminent experts in forensic pathology, Dr. Milton Helpern, medical examiner of the City of New York, and Dr. Cyril Wecht, medical

ner of Allegheny County, Pennsylvania. (370-
70-500) Each of these men testified to his con-
n, separately reached, that Mrs. Moore died as
lt of one major fall and subsequent further falls
caused the skull fracture, the major avulsing
d and the other bruises. These doctors specifically
reed with the conclusion of Drs. Boram and
ng that the origin of the death-producing injuries
multiple blows to the head for the following rea-

The avulsing scalp wound was a shearing injury which tore in one flap; there were no bruises along the edges of the flap indicative of multiple blows;

the fracture of the skull was basically lineal with a single point of origin; an egg-shaped depressed fracture would be expected if the injuries resulted from a blunt instrument, and, if from multiple blows, more than one point of fracture.

Most importantly, the autopsy reported a contre-coup injury, or injury away from the point of force. Mrs. Moore had brain injury directly below the skull fracture in the rear of the head but also suffered brain injury in the front of the head away from the point of the fracture. This pattern is typical of an injury caused by fall, that is, when the head accelerates onto a hard surface as opposed to when the head is struck by a blunt instrument;

Also of note, the amount of blood which so shocks the lay-observer of the photographs, was consistent with on-the-scene investigations of accidental deaths conducted by both forensic pathologists in their lifetime work.

Under cross-examination neither doctor could absolutely exclude the possibility of a criminal agency.

In rebuttal, the Commonwealth called certain police officers to refute testimony by petitioner and his stepdaughter that the police had indicated on December 5th that Mrs. Moore's death was an accident. (558-562) Dr. Boram was recalled to testify that Dr. Helpern had been anonymously shown photos of Mrs. Moore's body at a professional conference. Without access to the essential autopsy report, Dr. Boram testified Dr. Helpern stated the pictures portrayed a violent crime.[2] (568-73)

With the factual evidence thusly framed, the case went to the jury after final arguments by counsel. The federal question posed by this petition pertains to the closing argument of the Commonwealth. (606-622, 18a-28a) Petitioner objected throughout the summation and at its conclusion moved for a mistrial on grounds the argument overstepped the bounds of proper advocacy. (624) In his appellate brief below, petitioner urged that the improper argument had denied him a fair trial citing this Court's leading decision on prosecutorial summation, *Berger* v. *United States,* 295 U.S. 78 (1935). The court of appeals summarily dismissed this contention on the basis that the summation was within the bounds previously permitted by that court. (16a)

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[2] Because no proper foundation was laid for such cross-examination by prior inconsistent statement, Dr. Helpern never had the opportunity to explain the statement. In rejecting this point as error on appeal, the court ruled that no proper objection was taken to Dr. Boram's rebuttal testimony although petitioner specifically objected to the testimony. (565-67, 574)

REASONS FOR GRANTING THE WRIT

This petition raises a substantial question of federal law which is of particular importance because it bears directly on the integrity of the jury's guilt-determining function. In his closing argument, the prosecutor violated every proscription this Court has previously imposed upon prosecutors during summation. In *Berger* v. *United States*, 295 U.S. 78 (1935), this Court held that improper insinuations and assertions in the closing argument of a prosecutor calculated to mislead the jury were grounds for reversal where the case against the accused was not strong and the misconduct was pronounced and persistent. In *New York Central R.R. Co.* v. *Johnson*, 279 U.S. 310 (1929), the Court reversed where the closing argument of counsel in a civil case contained an improper appeal to the prejudice of a rural jury against a New York railroad company. Other decisions have indicated that arguments irrelevant to the real issues in a case and calculated to appeal to the passions and prejudices of a jury may violate the constitutional guarantee of a fair trial. See *Viereck* v. *United States*, 318 U.S. 236, 248-49 (1943); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 237-243 (1939). The closing argument below combined many of the improprieties previously condemned by this Court and the condonation of the prosecutorial conduct by the court of appeals conflicts with the principles of these decisions.

The *Berger* criteria of a close case, pronounced and persistent misconduct and a summation calculated to mislead are amply met here. In few, if any, criminal cases is the evidence more balanced or the danger of arousing a jury to passion above reason more acute. The jury had to resolve inter-relating credibility ques-

tions: Was the petitioner telling the truth or, more fundamentally, which set of experts was correct? For, while exceedingly shocking, the physical evidence standing alone added nothing to the rational determination of guilt or innocence without the guidance of capable, dispassionate experts.

The prosecutor was required to focus the jury's attention on these critical credibility questions and, utilizing his skill as an advocate, convince them of the correctness of the Commonwealth's position. His primary duty, was "not to convict but to see that justice was done." American Bar Association Canons of Professional Ethics No. 5 (1968). Thus, his adversary posture should have been rational discourse and not inflammatory rhetoric.

Here, perhaps because by special training, education and experience, the defense experts were more qualified than the Commonwealth's or because they gave more thorough reasons for their conclusions, the prosecutor made absolutely no effort in his summation to aid the jury's reasoned resolution of the disputed issues. On the contrary, he injected himself into the case during the argument by giving opinion and factual testimony and by directly appealing to the passions of the members of the jury. The net effect of the summation was to make the prosecutor a most important witness against petitioner while denying petitioner's right to confront him by cross-examination or even by answering argument since the Commonwealth had the last word. See *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Douglas* v. *Alabama*, 380 U.S. 415 (1965).

The summation covers sixteen pages. The first five are unremarkable, addressed to a summary of the prosecution's evidence. Recognizing that to convict he

had to discredit the strong defense case, the prosecutor saved his illicit ammunition for that attack and the last eleven pages are laced with improprieties. The heart of the summation was a calculated attempt to mislead the jury by conveying the unsupportable impression that the rich architect arranged to get his brother, the smart New York lawyer, to buy off the political hack doctors from New York City and Pennsylvania so they would come down to the hills of Kentucky and deceive the plain country folk of the jury.

In his earlier examinations of Dr. Helpern both in chambers and in open court, the prosecutor failed to establish facts in support of his diversionary tack. The testimony in both instances revealed that petitioner's local counsel had first contacted the doctor by sending materials on to him for study, and the role of petitioner's brother, a New York lawyer, was confined to checking on the arrival of the materials. (361-64, 365-67, 390-91) Undaunted, the prosecutor argued to the jury:

> At this point let's compare the medical opinions of Dr. Boram and Dr. Lansing with that of the paid opinions of Dr. Helpern, the New York doctor, and Dr. Wecht, the Pittsburgh doctor. We'll muddy the water with a dumb Kentucky jury. We'll come in with a smart lawyer from New York . . . We'll pull the wool over the eyes of the jury down there in the hills of Kentucky. Unable to get a doctor here, the brother of the defendant on trial, a New York lawyer who sits within the sound of my voice, got Dr. Helpern. (612-613, 21a-22a) (objections omitted)

As an appeal to sectional prejudice and class bias this argument is reprehensible. See *New York R.R. Co.* v.

Johnson, supra at 319. But the impropriety is compounded by the prosecutor's testimonial assertions[3] including a calculated misstatement of the evidence as to Dr. Helpern's retention, the unsupported statement that the defense was unable to retain a Kentucky doctor, and the patently unsupportable inference that Drs. Wecht and Helpern were paid perjurors.[4]

The summation's emotional peak occurred when the prosecutor threw a two-foot high bathroom stool

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[3] The prosecutor became a witness in several other different respects. He indicated the only way petitioner's wife could have received her injuries from a fall was if the fall had occurred from the 10th floor of the Inter-Southern Building. (612, 21a) No testimony was elicited from anyone at the trial about a fall from the Inter-Southern Building or any opinion that a fall of that height would be required. He repeatedly bolstered his doctors' credibility by saying, again without evidentiary foundation, that they were uncompensated. For example, the prosecutor urged:

> Now that is the testimony of the paid, compensated doctors they go all over the country to get, as compared with testimony of the uncompensated doctors of the State of Kentucky. You will, I am sure, properly evaluate that testimony. (616, 24a)

Then, to counter petitioner's suggestion during his testimony that pretrial discovery of certain Commonwealth evidence had been delayed, the prosecutor argued and mistated facts beyond the record. (617, 24a-25a)

[4] Other assertions by the prosecutor contributed to his suggestion that the out-of-state doctors were deliberately deceiving the jury. Referring to Dr. Helpern's review of the pictures at the professional meeting, the prosecutor said, "before the dough showed he said it was a death by violence." (615, 23a) Again, referring to the pictures, the prosecutor said:

> Now let's get to the evidence that don't make mistakes. These photographs and all the others, these photographs cannot be influenced by game or by money or by position in life or any other motive or thing cannot change or influence a photograph. That sometimes happens with other types of testimony. (618, 25a)

across the courtroom in a reenactment of the crime which was unsupported by the evidence. Throughout the trial the defense had sought to meet and explain any suggestion that the bathroom reflected the scene of a struggle rather than of an accident. Accordingly, the defense stressed that none of Mrs. Moore's clothing was torn, no buttons ripped and although she had tissue under her fingernails, petitioner bore no scratches nor any other sign of struggle. (587) When one of the FBI agents testified that hair similar to Mrs. Moore's was found on the stool and examination of the roots indicated it had been forcibly extracted, (345-48) defense counsel quite properly brought out on cross-examination that combing hair forcibly extracts it by the roots. (350-353) Since the agent did not testify he found any significant concentration of hair and since the stool was used for a woman's vanity, the cross-examination on hair combing was extremely pertinent. In response to that line of questioning, the prosecutor suggested in his summation that the stool was the murder weapon although the expert testimony appeared to contradict that suggestion. Then while flinging the chair across the room he urged, "You don't comb your hair with this." (619, 26a) The exact effect on the jury as the stool crashed around the courtroom can only be surmised, but the prosecutor's conduct was calculated to arouse passion over reason.

The improprieties in this argument were not "minor abberations" in an otherwise proper summation. See *United States* v. *Socony-Vacuum Oil Co., supra* at 240. Nor were the improprieties provoked by a like attack on the part of the defense. And finally, the trial court

took no curative action to discredit the prosecutor's approach. The judge did sustain objections to certain arguments which were beyond the evidence (612, 21a; 617, 25a) and mildly chastized the prosecutor for the stool-throwing incident. (619, 26a). But the court issued no cautionary instructions evidencing a rejection of the prosecution's approach and denied the vast majority of the petitioner's objections.

On the rare occasion that the trial court sustained an objection the prosecutor excused his excesses by expressing his personal opinion as to the petitioner's guilt. He stated:

> "And at this point gentlemen, may I apologize if I seem to get too excited. It is only because of my sincere belief, my unquestioned belief based solely on the evidence that you've heard that this is a willful murder case." (612, 21a)

And again, in arguing for the imposition of the death penalty for wilfull murder, the prosecutor asserted:

> You were told in the opening statement—I knew the facts of this case, of course, and I haven't slept I'll tell you in the last week, and I prayed to my God that I would have persuasive power to see that a jury did justice in this case, justice that I know should be done, and I'm speaking to you now from what has been presented from the witness stand, of course, but I did pray to my God, and I haven't slept from the fear that I might overlook something that would prevent justice from being done. (621, 27a)

Permitting this argument, the lower court follows one branch of a conflict between state decisions and between federal courts of appeal as to the effect of an expres-

sion of personal opinion as to guilt coupled with a reference indicating that the opinion is based on the evidence. See Annot., 50 A.L.R.2d 766 (1956). Some courts have indicated that the expression of individual belief is permissible so long as the belief "is based solely on the evidence introduced and the jury is not led to believe that there is other evidence, known to the prosecutor but not introduced, justifying that belief." *Henderson* v. *United States,* 218 F.2d 14, 19 (6th Cir. 1955); accord, *Thompson* v. *United States,* 272 F.2d 919 (5th Cir. 1959); *Schmidt* v. *United States,* 237 F.2d 542, 543 (8th Cir. 1956). Other circuits adhere to the absolute proscription against personal opinions contained in the Canons of Ethics, "not only because counsel would then in effect be a witness not under oath or subject to cross-examination but because the false issue of credibility of counsel, with government having the advantage, would be injected." *Patriarca* v. *United States,* 402 F.2d 314, 321 (1st Cir. 1968), cert. denied, 393 U.S. 1022 (1969); accord, *United States* v. *Cotter,* 425 F.2d 450 (1st Cir. 1970); *Harris* v. *United States,* 131 U.S.App.D.C. 105, 402 F.2d 656 (1968).

This Court should grant this petition to resolve this conflict affecting a vital step in the criminal justice system. Closing argument provides any advocate a most persuasive forum. The prosecutor in a criminal case has the added advantage of being the representative of all the people and often, as here, speaks to the jury last. The success of the guilt-determining process not only does not need but cannot withstand a prosecutor's expressions of personal belief in the guilt of the accused. Such expressions constitute unsworn testimony which, if offered in court, would be inadmissible. The additional assertion that the belief is

based upon the record affords no guarantee that the jury will not conclude the prosecutor possesses special knowledge due to his unique position, especially where as here he asserts: "I've never seen anything like it in the some 25 years I've been prosecuting these cases. (622, 27a)

The prosecutor's argument was contrary to applicable decisions of this Court. It violated virtually every proscription in the standards recommended by the American Bar Association's Project on Criminal Justice. See American Bar Association, *Project on Standards for Criminal Justice, The Prosecution Function,* § 5.8, and commentary (Approved Draft 1971). Counsel's intentional misstatement of the evidence and expressions of personal belief are expressly forbidden by the Canons of Ethics. See American Bar Association Canons of Professional Ethics Nos. 15 and 22 (1968); American Bar Association Code DR. 7-106(C) (4). Yet the court below affirmed the conviction virtually endorsing the summation. Too many courts, when confronted with summation violations, have either failed to reverse without comment or failed to reverse with a slap on the wrist to the prosecutor involved. Judge Jerome Frank criticized this approach:

> Such an attitude of helpless piety is, I think, undesirable. . . . If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. . . . The depracatory words we use in our opinions on such occasions are purely ceremonial. United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2d Cir.) (dissent), cert. denied 329 U.S. 742 (1946).

This Court should take the opportunity afforded by this petition to reaffirm the salutary principles of *Berger* v. *United States* and make clear that all prose-

cutors in both state and federal courts must adhere to basic standards of fairness and decorum or suffer the meaningful sanction of appellate reversal.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be granted.

Respectfully submitted,

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